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Roger D. Rowe

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# AFTER *BALI*: CAN THE WARSAW CONVENTION BE PROVEN A TAKING UNDER THE FIFTH AMENDMENT?

ROGER D. ROWE

## I. INTRODUCTION

SINCE THE United States became a signatory to the Warsaw Convention (Convention),<sup>1</sup> the American attitude toward it has been marked with disfavor.<sup>2</sup> The source of much disdain is the limitation on airline liability under the Convention.<sup>3</sup> Very recently, for example, the United States Supreme Court may have subtly registered its disfavor of the liability limitation, though rendering a decision upholding its continued enforceability.<sup>4</sup> In this atmosphere of restrained hostil-

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<sup>1</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 127 L.N.T.S. 11 (1934), [hereinafter cited as Convention]. For an overview of the Convention itself and its underlying principles, see notes 41-89 and accompanying text.

<sup>2</sup> See, e.g., *Lisi v. Alitalia - Linee Aeree Italiane*, 370 F.2d 508, 515 (2d Cir. 1966) (Moore, J., dissenting) ("The majority do not approve of the terms of the treaty and therefore, by judicial fiat they rewrite it. They think a 'one-sided advantage' is being taken of the passenger. . . ."); see generally, Comment, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805 (1983); Lowenfeld, *The United States and the Warsaw Convention*, 54 DEP'T STATE BULL. 580, 580-81 (1966) (Opening Statement of the Chairman of the U.S. Delegation to the Montreal Conference).

<sup>3</sup> See *infra* notes 63-89 and accompanying text.

<sup>4</sup> See *Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445 (U.S. April 17, 1984). The majority in *Franklin Mint* first noted that the "Convention's framers viewed the treaty as one 'drawn for a few years, not for one or two centuries'." The Court then added in conclusion:

In the United States the authority to make that conversion [from the limitations expressed in gold francs in the Convention to dollars] has been delegated by Congress to the Executive branch. The courts are bound to respect the arrangement [the perpetuation of the liability limitations through their conversion into dollars based on the last official

ity, the Ninth Circuit Court of Appeals has raised, *sua sponte*,<sup>5</sup> an important issue challenging the Convention's legality. In *In re Aircrash in Bali, Indonesia on April 22, 1974*,<sup>6</sup> the Ninth Circuit questioned whether the Convention's liability limitation constitutes a taking of property without just compensation under the fifth amendment to the United States Constitution.<sup>7</sup>

The litigation in *Bali* arose following the crash of a Pan American World Airways jetliner into a mountain near the southern tip of the island of Bali, Indonesia.<sup>8</sup> All ninety-six passengers and eleven crew members were killed.<sup>9</sup> The Judicial Panel on Multidistrict Litigation<sup>10</sup> ordered all the suits from this accident filed in federal courts transferred to the United States District Court for the Central District of California.<sup>11</sup> Most of the suits were settled, but wrongful death actions filed by the survivors of three of the passengers

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price of gold] unless the properly delegated authority is exercised in a manner inconsistent with domestic or international law.

*Id.* at 4449. Justice Stevens, in dissent, expressed his attitude toward the Convention more directly than the majority. He stated, "though the applications of the Warsaw Convention is anachronistic in today's world of aviation, we are obliged to enforce it so long as the political branches of the Government adhere to the Convention." *Id.* at 4453 (Stevens, J., dissenting).

<sup>5</sup> *Sua sponte* is a latin term meaning by one's own will or motion and without suggestion. BLACK'S LAW DICTIONARY 1277 (5th ed. 1979).

<sup>6</sup> 684 F.2d 1301 (1982).

<sup>7</sup> The fifth amendment reads in its entirety:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

<sup>8</sup> *In re Aircrash in Bali, Indonesia*, 462 F. Supp. 1114, 1116 (C.D. Cal.1978).

<sup>9</sup> *Id.*

<sup>10</sup> See 28 U.S.C. § 1407 (1982) (authorizing transfer of civil actions involving common questions of fact to any district court). See also Herndon & Higginbotham, *Complex Multidistrict Litigation — An Overview of 28 U.S.C. § 1407*, 31 BAYLOR L. REV. 33 (1979), for an overview of multidistrict litigation.

<sup>11</sup> 462 F. Supp. at 1116.

were not.<sup>12</sup> These plaintiffs rejected the limited recovery under the Convention (for which the defendant Pan Am would have been strictly liable once it was proven the Convention applied).<sup>13</sup> Instead, the plaintiffs proceeded to trial on a negligence theory, seeking full compensatory damages under California law completely independent of the provisions of the Convention.<sup>14</sup>

The trial was bifurcated so that all issues as to the limitation of damages, including the applicability of the Convention, were deferred until the jury's verdict on damages.<sup>15</sup> The jury assessed total damages resulting from the negligence of the defendants at \$951,000.<sup>16</sup> The issue then remained as to the effect of the limitation on air carrier liability under the Convention.<sup>17</sup>

The district court interpreted the Convention so that its limitation on liability was not imposed.<sup>18</sup> The court reasoned that the language of the Convention itself<sup>19</sup> and the case law interpreting it<sup>20</sup> supported the proposition that the liability limitation is contractual in nature.<sup>21</sup> The court saw the airline ticket as the contract through which liability was limited.<sup>22</sup> It concluded that such a contractual limitation on a wrongful death action was inoperative under California law,

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* See *infra* text accompanying note 86.

<sup>14</sup> See 462 F. Supp. at 1116.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1117.

<sup>18</sup> *Id.* at 1119.

<sup>19</sup> *Id.* The district court's textual analysis focused upon articles 1, 3, and 22 of the Convention. *Id.* at 1119-20 & n.12. See Convention, *supra* note 1, at art. 1(2) (defining "international transportation" in terms of places of departure and destination and stopping places "according to the contract made by the parties"); *id.* at art. 3(2) (stating that loss of the passenger ticket "shall not affect the existence or the validity of the contract of transportation" but that nondelivery of a ticket will not allow the carrier to "avail himself of those provisions of this convention which exclude or limit his liability"); *id.* at art. 22 (limiting damages to 125,000 francs but providing "by special contract" for a higher limit of liability).

<sup>20</sup> See, e.g., *Block v. Compagnie Nationale Air France*, 229 F. Supp. 801, 811 (N.D. Ga. 1964) (stating that since air carriers may contract for limited liability, that limitation, by implication, is contractually based).

<sup>21</sup> 462 F. Supp. at 1119.

<sup>22</sup> *Id.* at 1121-24.

which interprets the action as being independent of any rights of the deceased and not compromised by any contracts the deceased may have made.<sup>23</sup> The district court thus did not reduce the verdict to the limit imposed by the Convention.<sup>24</sup>

Pan Am appealed to the Ninth Circuit Court of Appeals the district court's holding regarding the inapplicability of the Convention.<sup>25</sup> The appellate court reversed the district court's ruling on the liability limitation, holding that to the extent that California law would prevent the application of the Convention's limitation on liability, it had been preempted by the Convention.<sup>26</sup> The court premised its holding upon the fact that the limitation of airline liability was a primary purpose of the Convention when the Senate originally ratified it.<sup>27</sup> The court stated that any local law impeding the execution of the objectives of Congress must yield.<sup>28</sup>

The plaintiffs cross-appealed, arguing that the Convention's liability limitation was unconstitutional in that, first, the limitation was so arbitrary and unreasonable as to deprive them of substantive due process;<sup>29</sup> second, the limitation deprived them of the equal protection of the laws;<sup>30</sup> and third, the limitation impermissibly burdened their constitutional right to travel.<sup>31</sup> The Ninth Circuit found the due process and right to travel arguments persuasive, but it stated that these contentions would fail if another remedy, such as a fifth amendment "taking" claim against the United States, were available to fully compensate victims of international air disasters.<sup>32</sup> The court concluded that such a remedy

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<sup>23</sup> *Id.* at 1117.

<sup>24</sup> *Id.* at 1124.

<sup>25</sup> *In re Aircrash in Bali, Indonesia* on April 22, 1974, 684 F.2d 1301 (9th Cir. 1982) [hereinafter cited as *Bali*].

<sup>26</sup> *Id.* at 1308.

<sup>27</sup> *Id.* at 1307-08.

<sup>28</sup> *Id.* at 1307.

<sup>29</sup> See Comment, *Due Process, Equal Protection and the Right to Travel: Can Article 22 of the Warsaw Convention Stand Up to These Constitutional Foes?*, 49 J. AIR L. & COM. 907, 922-28 (1984).

<sup>30</sup> *Id.* at 928-33.

<sup>31</sup> *Bali*, 684 F.2d at 1309. See Comment, *supra* note 29, at 933-42.

<sup>32</sup> *Bali*, 684 F.2d at 1310.

would be available in the United States Claims Court.<sup>33</sup> The court, however, did not hold that there was a "taking." It held only that the claims court had jurisdiction to hear a fifth amendment taking claim against the United States.<sup>34</sup>

In this context the Ninth Circuit outlined, in dicta, what it perceived to be the proper course of events culminating in a successful taking claim. A plaintiff must first win a verdict on a cause of action under state law as did the plaintiffs in *Bali*.<sup>35</sup> The trial court must then impose the Convention's liability limitations upon the damages determined under state law, possibly resulting, in the opinion of the Ninth Circuit, in a "taking" of a portion of the claim.<sup>36</sup> Finally, the plaintiff must file a "taking" claim against the United States in the claims court.<sup>37</sup>

The path delineated in *Bali*, however, is neither certain in its destination nor easy to traverse. This comment will examine the major legal obstacles that will appear in the determination of whether a taking has occurred. These obstacles include the jurisdiction of the claims court,<sup>38</sup> the fifth amendment requirement of a property right,<sup>39</sup> and the various approaches the claims court could take in addressing the taking issue.<sup>40</sup> In order to provide an adequate background for this endeavor, however, this comment initially focuses upon the Convention itself.

## II. THE WARSAW CONVENTION

Perhaps no single document in the history of aviation has evoked as much controversy as the Warsaw Convention.<sup>41</sup> Commentators have duly noted the various appeals for reform, the position of the American government in regard to

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1315-16. See *infra* note 116.

<sup>35</sup> 684 F.2d at 1312.

<sup>36</sup> *Id.* at 1312-13 & n.11.

<sup>37</sup> *Id.* at 1312.

<sup>38</sup> See *infra* notes 116-157 and accompanying text.

<sup>39</sup> See *infra* notes 166-232 and accompanying text.

<sup>40</sup> See *infra* notes 233-288 and accompanying text.

<sup>41</sup> See generally DeVivo, *The Warsaw Convention: Judicial Tolling of the Death Knell?*, 49 J. AIR L. & COM. 71, 71-95 (1983).

reform, and the effects of major American judicial decisions upon the Convention's status.<sup>42</sup> The following examination of the Convention, therefore, is not a recitation of its complete history. Rather, this perusal merely highlights those aspects of the treaty either necessary to an understanding of, or material to, the claims asserted by a *Bali* plaintiff.

The Convention emerged from international conferences in Paris in 1926 and Warsaw in 1929.<sup>43</sup> These conferences were called to prepare a legal solution to the problems anticipated when international civil aviation eventually reached maturity and linked together many nations with disparate legal systems and differing languages.<sup>44</sup> The purpose of the Convention was actually twofold.<sup>45</sup> First, the conferees sought to establish uniformity in the law applicable to claims arising out of international transportation.<sup>46</sup> Agreement was reached as to transportation documents,<sup>47</sup> jurisdiction,<sup>48</sup> the period of limitations,<sup>49</sup> and the proper party defendant where successive carriers were employed in one undivided transportation.<sup>50</sup> Second, and clearly most importantly, the conferees sought to limit the potential liability of carriers in the event

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<sup>42</sup> See generally, e.g., Haskell, *The Warsaw System and the U.S. Constitution Revisited*, 39 J. AIR L. & COM. 483 (1973); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967); Rhyne, *International Law and Air Transportation*, 47 MICH. L. REV. 41, 53-61 (1948); Comment, *supra* note 2, at 805.

<sup>43</sup> Lowenfeld & Mendelsohn, *supra* note 42, at 498.

<sup>44</sup> *Id.* World aviation was radically different in 1929 than it is today. Charles Lindbergh had flown the Atlantic only two years before. Wright, *The Warsaw Convention's Damages Limitations*, 6 CLEV.-MAR. L. REV. 290 (1957). Pan American was the only American carrier flying an international route; it flew from Havana, Cuba to Key West, Florida, a distance of ninety miles. *Id.* at 291, 294. European carriers did little more than fly very short routes linking the continent with England and Africa. *Id.* at 291. In fact, many at this time thought that dirigibles were the transportation mode of the future. *Id.* at 290.

<sup>45</sup> Lowenfeld & Mendelsohn, *supra* note 42, at 498.

<sup>46</sup> *Id.* at 498-99.

<sup>47</sup> Convention, *supra* note 1, at art. 3 (specifications for passenger ticketing and way bills).

<sup>48</sup> *Id.* at art. 28 (providing jurisdiction at the carrier's domicile or principle place of business, the carrier's place of business through which the contract was made, or at the destination of the flight).

<sup>49</sup> *Id.* at art. 29 (allowing two years in which to bring an action).

<sup>50</sup> *Id.* at arts. 1(2), 30 (the carrier actually transporting is the proper defendant where loss occurs during the portion of the transportation under its supervision).

of aviation accidents.<sup>51</sup> This limitation was imposed at the approximate equivalent of \$8300.<sup>52</sup>

The chief purpose of the Convention, the limitation of potential liability,<sup>53</sup> obviously benefitted the air carriers, not the passenger.<sup>54</sup> The drafters expected that the limitation would aid the development of international air transportation by shielding air carriers from the debilitating consequences of a single catastrophe<sup>55</sup> and allowing carriers to obtain insurance at more favorable rates.<sup>56</sup> Moreover, the drafters believed that the scheme of limited liability under the Convention would ultimately enable the airlines to attract the capital necessary for their growth and development.<sup>57</sup>

Though the Convention may have most favored the airlines, the passengers obtained advantages as well. The Convention's very existence assured that one international law would supplant the conflicting local laws and their concomi-

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<sup>51</sup> See Calkins, *Grand Canyon, Warsaw and the Hauge Protocol*, 23 J. AIR L. & COM. 253 (1956).

<sup>52</sup> Lowenfeld & Mendelsohn, *supra* note 42, at 499.

The limitation set forth in the Convention is 125,000 French francs valued in terms of a specified content of gold. See Convention, *supra* note 1, at art. 22. At the same time the Convention was drafted, the official price of gold in the United States was \$20.27 per ounce and the limitation in American currency was approximately \$5,000. When the official price of gold in the United States was pegged at \$35.00 per ounce, the limitation increased to \$8,291.87. See Parker, *The Adequacy of the Passenger Liability Limits of the Warsaw Convention of 1929*, 14 J. AIR L. & COM. 37, 39 (1947). See also *Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445, 4446 (U.S. April 17, 1984).

In concluding that 125,000 francs was the appropriate limitation on carrier liability, the drafters of the Convention sought to achieve a mean economic value on human life which would make the Convention acceptable to all the countries of the world. Parker, *supra*, at 39. By increasing the number of signatory countries, the goal of uniformity in the law was enhanced. See Lowenfeld & Mendelsohn, *supra* note 42, at 504. To appease those developed countries, such as the United States, where a high economic value has been placed on human life, the drafters shifted the burden of proof to the defendant airline as a bargain for the low liability limitations. Parker, *supra*, at 39.

<sup>53</sup> See Lowenfeld & Mendelsohn, *supra* note 42, at 499; Parker, *supra* note 52, at 39.

<sup>54</sup> Lowenfeld & Mendelsohn, *supra* note 42, at 500.

<sup>55</sup> *Id.* at 499.

<sup>56</sup> *Id.* at 499-500 (quoting Letter from Secretary of State Cordell Hull to President Roosevelt, reprinted in 1934 U.S. Avi. R. 240).

<sup>57</sup> *Id.* at 499. The United States ratified the Convention during the depth of the great depression, when capital was unavailable for any industry, and certainly for the very accident-prone airlines. 2 J. KENNELLY, LITIGATION AND TRIAL OF AIR CRASH CASES, ch. 7, at 7 (1968).



tant jurisdictional and choice of law problems.<sup>58</sup> The Convention also specifically prohibited any attempt to fix a lower limit on the carriers' liability than that prescribed under its terms.<sup>59</sup> Most importantly, the Convention presumed under negligence principles<sup>60</sup> that carriers were liable unless they had taken all necessary measures to avoid damage or it was impossible to do so.<sup>61</sup> In addition, the terms of the Convention precluded the imposition of the liability limitation for damage caused by the carriers' willful misconduct.<sup>62</sup>

Although the United States did not participate in the drafting of the Convention, it became a signatory in 1934, one year after the Convention became effective.<sup>63</sup> Then as early as 1935, debates concerning revision of the Convention commenced before international aviation forums.<sup>64</sup> Conferences discussing various subjects related to revision, and in particular amendments increasing the liability limitation,<sup>65</sup> were held before the International Civil Aviation Organization on four occasions between 1946 and 1953,<sup>66</sup> but no changes occurred.<sup>67</sup>

Finally, the American public's growing indignation toward the low liability limitation fostered a movement for the United States to withdraw from the Convention.<sup>68</sup> A diplomatic conference consequently convened at the Hague in 1955 for the purpose of drafting amendments to the Convention.<sup>69</sup> The American representatives at the Hague sought maximum recoveries for victims of air disasters<sup>70</sup> but succeeded in raising the limit to only \$16,600, in what became

<sup>58</sup> 2 J. KENNELLY, *supra* note 57, ch. 7, at 7.

<sup>59</sup> Convention, *supra* note 1, at art. 23.

<sup>60</sup> Lowenfeld & Mendelsohn, *supra* note 42, at 500.

<sup>61</sup> Convention, *supra* note 1, at art. 20.

<sup>62</sup> *Id.* at art. 25.

<sup>63</sup> Lowenfeld & Mendelsohn, *supra* note 42, at 501-02.

<sup>64</sup> *Id.* at 502.

<sup>65</sup> *Id.* at 504.

<sup>66</sup> *Id.* at 502-03.

<sup>67</sup> See Calkins, *supra* note 51, at 256-58.

<sup>68</sup> Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291, 294-95 (1965).

<sup>69</sup> *Id.*

<sup>70</sup> Lowenfeld & Mendelsohn, *supra* note 42, at 507.

known as the Hague Protocol.<sup>71</sup> The response of American politicians to the continued low liability limits, and to special protection of the aviation industry in general, was so negative that the President never transmitted the Hague Protocol to the Senate for its approval.<sup>72</sup>

The controversy over the liability limitation reached a climax when, in 1965, the United States formally denounced the Convention.<sup>73</sup> The denunciation was conditioned for six months,<sup>74</sup> however, upon an international agreement on a liability limit of approximately \$100,000 per passenger or an interim agreement by a majority of international air carriers which would waive the liability limit up to \$75,000 per passenger.<sup>75</sup> After the notice of denunciation was given, a diplomatic conference convened in Montreal.<sup>76</sup>

At Montreal, Andreas Lowenfeld, the chairman of the United States delegation, officially expressed the American government's displeasure with the Convention.<sup>77</sup> He stated that the liability limitation was archaic<sup>78</sup> and that the advantages provided by the Convention — the presumption of liability in the carrier, the placement of jurisdiction, and the preclusion of further limitations on carrier liability<sup>79</sup> — were already provided under modern American jurisprudence.<sup>80</sup> He strongly implied that the interests of the United States in

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<sup>71</sup> Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, 478 U.N.T.S. 372 (1955) [hereinafter cited as the Hague Protocol]. The Hague Protocol, however, also deleted the willful misconduct exception (*See* Convention, *supra* note 1, at art. 25) and replaced it with a higher standard of care that would have been almost impossible to prove. Kreindler, *supra* note 68, at 295.

<sup>72</sup> Lowenfeld & Mendelsohn, *supra* note 42, at 510, 516.

<sup>73</sup> *See* Haskell, *supra* note 42 at 486-87.

<sup>74</sup> The Convention provides that denunciation shall take effect six months after the notification of denunciation. *See* Convention, *supra* note 1, at art. 39.

<sup>75</sup> *U.S. Gives Notice of Denunciation of Warsaw Convention*, 53 DEP'T ST. BULL. 923 (1965). The Convention provides for voluntary agreements by special contract between the carrier and passenger for liability in excess of that imposed by the Convention. *See* Convention, *supra* note 1, at art. 22.

<sup>76</sup> Lowenfeld & Mendelsohn, *supra* note 42, at 551.

<sup>77</sup> *See generally* Lowenfeld, *supra* note 2, at 580.

<sup>78</sup> *Id.*

<sup>79</sup> *See supra* text accompanying notes 46-50.

<sup>80</sup> Lowenfeld, *supra* note 2, at 583. *See* Lowenfeld & Mendelsohn, *supra* note 42, at 516-32, for an overview of the developments in American jurisprudence.

maintaining international cooperation was the only benefit being reaped under the Convention.<sup>81</sup>

Despite the fact that withdrawal by the United States would have destroyed the system set up under the Convention,<sup>82</sup> the diplomats at the Montreal conference failed to reach any consensus on the appropriate liability limits.<sup>83</sup> Before the denunciation became effective, however, the air carriers themselves, fearful of unlimited liability, did agree to an interim accord,<sup>84</sup> the Montreal Agreement.<sup>85</sup> The net effect of the Montreal Agreement was to create absolute liability in the adhering airline for any death or injury of a passenger and to establish a liability limit of \$75,000.<sup>86</sup> But the Agreement did not amend the text of the Convention.<sup>87</sup> It was a voluntary agreement among the airlines that covered only those flights which included a point of origin, destination, or an agreed stopping place in the United States.<sup>88</sup> Although the Agreement was intended to be temporary, it remains in effect today.<sup>89</sup>

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<sup>81</sup> See Lowenfeld, *supra* note 2, at 583. The position asserted by the American delegation at the Montreal Conference received popular support in this country. See N.Y. Times, Oct. 23, 1965, at 30, col. 2 (city ed.) ("As we have previously said on this page, we would prefer outright renunciation of the Warsaw Convention and rejection of the [Hague] protocol because they are no longer needed by the airlines and have never been in the interests of passengers."), *quoted in* Kreindler, *supra* note 68, at 291-92. *But cf.* Senate Comm. on Foreign Relations, *Message from the President of the United States Transmitting a certified copy of the Protocol*, S. EXEC. DOC. NO. H, 86th Cong., 1st Sess. 22, 25 (1959) (Because of the uniform regime of law supplied by the Convention, "the benefits accruing to the United States from the Warsaw Convention, as amended by the Hague Protocol, would appear to outweigh the possible disadvantages to the United States . . .") *quoted in* Lowenfeld & Mendelsohn, *supra* note 42, at 514-15.

<sup>82</sup> See Haskell, *supra* note 42, at 487; Lowenfeld and Mendelsohn, *supra* note 42, at 590.

<sup>83</sup> Lowenfeld & Mendelsohn, *supra* note 42, at 575.

<sup>84</sup> *Id.* at 596.

<sup>85</sup> CIVIL AERONAUTICS BOARD, AGREEMENT 18900, AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION AND THE HAGUE PROTOCOL (1966), *approved* 31 Fed. Reg. 7302 (1966) (CIVIL AERONAUTICS BOARD, ORDER NO. E-23680 (May 13, 1966)) [hereinafter cited as Montreal Agreement].

<sup>86</sup> Haskell, *supra* note 42, at 488.

<sup>87</sup> *Id.*

<sup>88</sup> Montreal Agreement, *supra* note 85, at art. 1.

<sup>89</sup> In March of 1983, the Senate voted against ratification of the Montreal Protocols 3 and 4 which were the most recent attempts to amend the Warsaw Convention. The Protocols would have increased the liability limit to approximately \$109,000. The op-

Aside from the principles underlying the Convention and the more significant political developments affecting its status, one line of judicial decisions merits some attention. These cases, which focus on whether the Convention created a right of action, are noteworthy because of a possible defense facing a *Bali* plaintiff — that the Convention creates an exclusive right of action pre-empting all rights of action at state law.<sup>90</sup> Since the *Bali* scenario is predicated upon attaining a jury verdict at state law in excess of the liability limit imposed under the Convention and its progeny, the Montreal Agreement,<sup>91</sup> an exclusive right of action under the Convention would circumvent any potential taking claim at its inception.<sup>92</sup>

Whether a right of action exists under the Warsaw Convention was first addressed by a United States Court of Appeals in *Noel v. Linea Aerospostal Venezolana*.<sup>93</sup> This suit arose following the crash of a Venezulean airliner over the Atlantic Ocean. The plaintiffs, executors of one of the passengers, filed a civil suit in federal district court asserting a right of

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ponents of the Protocols successfully argued that amendment of the Convention would only prolong antiquation. See DeVivo, *supra* note 41, at 71-75.

<sup>90</sup> This comment does not address whether the substitution of an exclusive federal right of action under the Convention for a right of action at state law having no limitations on carrier liability constitutes a taking of property without just compensation. Nevertheless, that a taking may exist under such circumstances perhaps has some support in Justice Powell's dissenting statements in *Dames & Moore v. Regan*, 453 U.S. 654 (1980) (Powell J., concurring in part and dissenting in part). In response to the majority's position that revocable attachments against foreign assets frozen by Executive Order were not property interests which could be taken, Justice Powell stated, "there is a substantial question whether the [Executive] Orders themselves may have effected a taking by making conditional the attachments that claimants against Iran otherwise could have obtained without condition." *Id.* at 690 n.1.

<sup>91</sup> See *supra* notes 84-89 and accompanying text.

<sup>92</sup> An exclusive right of action under the Convention, a treaty, would fall within the treaty exception to the jurisdiction of the claims court. See *infra* notes 117-157 and accompanying text. Assuming exclusivity, a plaintiff's only viable challenge under the taking clause would have to follow Justice Powell's remarks in *Dames & Moore v. Regan*, 453 U.S. 654 (1980). See *supra* note 90. The proper forum would be a federal district court.

<sup>93</sup> 247 F.2d 677 (2d Cir. 1957). A federal court first considered whether the Convention created a right of action in *Choy v. Pan American Airways Co.*, 1 Av. Cas. (CCH) 946 (S.D.N.Y. 1941). *Choy* held that the Convention does not create a right of action. The court determined that a right of action could not exist without an enabling act vesting ownership of the right of action. *Id.* at 948-49.

action under the Convention.<sup>94</sup> The district court dismissed the complaint for lack of federal subject matter jurisdiction.<sup>95</sup> The Second Circuit affirmed, holding that the Convention did not create an independent right of action but created only a presumption of liability.<sup>96</sup> The appellate court did not rely upon a literal interpretation of the language of the Convention regarding carrier liability,<sup>97</sup> which states that "the carrier shall be liable for damages sustained."<sup>98</sup> Rather, the court interpreted the Convention in light of the report of the Secretary of State that was transmitted to the Senate prior to that body's ratification of the Convention.<sup>99</sup> This report, in summary fashion, stated that the Convention presumed liability in the carrier, but the report did not address the existence or nonexistence of a right of action.<sup>100</sup>

For over twenty years *Noel* remained good law.<sup>101</sup> Then in

<sup>94</sup> *Noel*, 247 F.2d at 679. The plaintiffs also alleged an action under the Federal Death on the High Seas Act, 46 U.S.C. §§ 761-67 (1976). 247 F.2d at 678. The court held that an action under this act was cognizable only in admiralty. *Id.* at 680.

<sup>95</sup> *Id.* at 678.

<sup>96</sup> *Id.* at 679. See 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3563 at 424-25 (1975) (discussing the jurisdictional statute of the federal district courts, 28 U.S.C. § 1331 (1976), as applied to a cause of action under the Convention).

<sup>97</sup> See *Noel*, 247 F.2d at 679.

<sup>98</sup> Article 17 of the Convention reads in its entirety:

The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Convention, *supra* note 1, at art. 17.

<sup>99</sup> *Noel*, 247 F.2d at 679. See Letter from Secretary of State Cordell Hull to President Roosevelt, reprinted in 1934 U.S. Av. R. 240, 243.

<sup>100</sup> *Id.* The report states in relevant part:

The effect of article 17 (ch.III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier. The burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier or his agents.

*Id.*

<sup>101</sup> See, e.g., Lowenfeld & Mendelsohn, *supra* note 42, at 519 ("[I]n all subsequent American Warsaw cases [following *Noel*] it was either assumed or decided that the claim must be founded on some law other than the Convention itself.').

*Benjamins v. British European Airways*,<sup>102</sup> the Second Circuit reappraised its position and held that a right of action did exist under the Convention.<sup>103</sup> The court grounded its reversal of *Noel* primarily upon two considerations.<sup>104</sup> First, it recognized that other common law signatories had adopted a version of the Convention clearly indicating the existence of a right of action.<sup>105</sup> Second, and more importantly, it noted that the nonexistence of a right of action was inconsistent with the intention of the drafters to create a uniform international law.<sup>106</sup>

Carrying the significance which *Benjamins* accorded uniformity to its logical extreme might seem to indicate that the right of action recognized should be construed as exclusive. Although the *Benjamins* majority never addressed exclusivity,<sup>107</sup> the dissenting judge was quick to add that the right of

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<sup>102</sup> 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). The plaintiffs in *Benjamins* pleaded federal jurisdiction under the Alien Tort Claims Act and general federal question jurisdiction arising under a treaty. *Id.* at 915-16. Since the Alien Tort Claims Act provided no basis for jurisdiction, the court addressed whether a right of action under the Convention would provide a basis. *Id.* at 916.

<sup>103</sup> The decision reached in *Benjamins* was long advocated by eminent commentators. See, e.g., Lowenfeld & Mendelsohn, *supra* note 42, at 517 (remarking that an independent right of action seemed to follow from the structure of the Convention); Calkins, *The Cause of Action Under the Warsaw Convention* pt. 1, 26 J. AIR L. & COM. 217, 218 (1959) (stating that the draftsmen intended to create a right of action based on the contract of carriage).

Ironically, the same circuit judge authored the opinions in both *Benjamins* and *Noel*. See *Benjamins*, 572 F.2d at 914; *Noel*, 247 F.2d at 678.

<sup>104</sup> *Benjamins*, 572 F.2d at 919. The court concluded that an examination of the text of the Convention proved inconclusive. *Id.* at 919. But see *Salamon v. Koninklijke Luchtvaart Maatschappij, N.V.*, 107 N.Y.S.2d 768, 773 (Sup. Ct. 1951) ("If the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Art. 17 did do."), *aff'd mem.*, 120 N.Y.S.2d 917 (1953); Calkins, *supra* note 103 (determining after an extensive examination of the text of the Convention and the minutes of the Conference at Warsaw that the drafters intended to achieve uniformity by a right of action).

<sup>105</sup> *Benjamins*, 572 F.2d at 918-19. See Calkins, *The Cause of Action Under the Warsaw Convention* pt. 2, 26 J. AIR L. & COM. 323, 324-25 (1959) (citing British, Canadian and Australian legislation).

<sup>106</sup> *Benjamins*, 572 F.2d at 918-19.

<sup>107</sup> See, e.g., *Salamon v. Koninklijke Luchtvaart Maatschappij*, 107 N.Y.S.2d 768 (Sup. Ct. 1951), *aff'd mem.*, 120 N.Y.S.2d 917 (1953). The *Salamon* court concluded that the Convention creates the exclusive right of action for damages suffered in that transportation to which its terms apply. *Id.* at 773. It explained:

The Convention obviously intended to integrate the rights and liabilities of the passengers and carrier in connection with "international transpor-

action recognized by the majority would not be exclusive.<sup>108</sup> He read article 24, which states that any action, "however founded," is subject to the conditions of the Convention,<sup>109</sup> as establishing that no right of action derived from the Convention would be exclusive.<sup>110</sup> This interpretation has the support of other courts and commentators alike.<sup>111</sup> For example, when the Ninth Circuit recently held that a right of action exists under the Convention,<sup>112</sup> it noted that article 24 clearly evidenced the drafters intention to make the action nonexclusive.<sup>113</sup>

The Second and Ninth Circuits now agree that a right of action does exist under the Convention, and both have indicated that the action is not exclusive.<sup>114</sup> The underlying assumption in the *Bali* case, that an action under state law is available to a victim of an international air disaster,<sup>115</sup> therefore, appears to rest on a solid foundation. The next hurdle, then, in a *Bali* plaintiff's quest for just compensation is establishing jurisdiction in the claims court.

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tation" as defined in the Convention, and "unify rules relating to international transportation by air" . . . . If the carrier, in addition to the liability provided for in the Convention, could also be subjected to such other liabilities as might exist under the laws of such state as might be selected for instituting suit, the very purpose of the convention as expressed therein, namely, to regulate "in a uniform manner the conditions of international transportation by air in respect of the . . . liability of the carrier" would be defeated.

*Id.* at 773-74.

<sup>108</sup> *Benjamins*, 572 F.2d at 922 n.6.

<sup>109</sup> See Convention, *supra* note 1, at art. 24.

<sup>110</sup> *Benjamins*, 572 F.2d at 922 n.6.

<sup>111</sup> See Calkins, *supra* note 103, at 225-26; *infra* notes 112-114 and accompanying text. But see Kennelly, *Response to Comments on Burdell v. Canadian Pacific Airlines*, 58 ILL. B.J. 454, 456 (1970) (stating that the Convention does not create a cause of action for wrongful death but limits the already existing causes of action).

<sup>112</sup> *In re Mexico City Aircrash* of October 31, 1979, 708 F.2d 400 (9th Cir. 1983). Since diversity jurisdiction had not sufficiently been alleged in the district court, the Ninth Circuit faced the issue of whether federal question jurisdiction was present by virtue of a cause of action under the Convention. *Id.* at 404 & n.4.

<sup>113</sup> *Id.* at 414 n.25.

<sup>114</sup> See *supra* notes 107-113 and accompanying text.

<sup>115</sup> See *supra* text accompanying notes 35-36.

## III. JURISDICTION OF THE CLAIMS COURT

Although much of the Ninth Circuit's opinion in *Bali* concerning the taking question was dicta, the court squarely held that the United States Claims Court has jurisdiction to decide whether the Convention effects a taking under the fifth amendment.<sup>116</sup> Under the *Bali* scenario, however, the taking claim would be filed in the claims court, not in a district court in the Ninth Circuit.<sup>117</sup> Hence, certain issues material to the jurisdiction of the claims court merit discussion.

Through the provisions of the Tucker Act,<sup>118</sup> the claims court has jurisdiction over any claim against the United States "founded upon . . . the Constitution."<sup>119</sup> In selecting this particular language, Congress intended to explicitly provide a remedy for the taking of private property for public use.<sup>120</sup> Accordingly, the Supreme Court has construed the jurisdiction of the claims court over taking claims to be as comprehensive as the Constitution.<sup>121</sup> The grant of jurisdiction in

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<sup>116</sup> *Bali*, 684 F.2d at 1313. See *supra* text accompanying notes 32-34 for the Ninth Circuit's reasoning. The holding of the Ninth Circuit in *Bali* regarding the jurisdictional statute of the claims court would apparently have no binding effect on the claims court, for the decisions of the claims court are appealable to the Federal Circuit, not the Ninth Circuit. See 28 U.S.C.A. § 1295 (West Supp. 1984). In addition, the United States would not be precluded from relitigating the issue of jurisdiction under the doctrines of res judicata and collateral estoppel because, among other reasons, it was not a party to the action in the *Bali* case. See generally M. GREEN, BASIC CIVIL PROCEDURE 227-41 (2d ed. 1979).

<sup>117</sup> See *supra* text accompanying notes 36-41. Under 28 U.S.C. § 1346 (1976), the district courts have jurisdiction concurrent with the claims court over any claim against the United States "founded . . . upon the Constitution." 28 U.S.C. § 1346 (1976). The concurrent jurisdiction of the district courts, however, extends only to claims not exceeding \$10,000.

<sup>118</sup> 24 Stat. 505 (1887) (codified, as amended, in various sections of 28 U.S.C.). For an overview of the statutory development of the jurisdiction of the claims court, see HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1326-27 (2d ed. 1973).

<sup>119</sup> 28 U.S.C. § 1491 (Supp. II 1978). The general grant of jurisdiction states in part: "The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution or any Act of Congress or any regulation of an executive department . . ." *Id.*

<sup>120</sup> Shea, *Statutory Jurisdiction of the Court of Claims: Past, Present, and Future*, 29 FED. B.J. 157, 158 (1970).

<sup>121</sup> See *Yearsley v. Ross Constr. Co.*, 309 U.S. 18, 21 (1940) (Hughes, C.J.) (stating that for any action constituting a taking under the fifth amendment, the claims court can entertain a suit for relief).



the Tucker Act is not absolute, however, because any claim "growing out of or dependent upon any treaty entered into with foreign nations"<sup>122</sup> is excepted from the jurisdiction of the claims court.<sup>123</sup>

The extent of the jurisdictional limitation was an issue under the scrutiny of the Supreme Court in the seminal opinion of *United States v. Weld*.<sup>124</sup> In *Weld*, Great Britain had agreed, in the Treaty of Washington,<sup>125</sup> to pay the United States Government approximately fifteen million dollars in satisfaction of claims asserted by the Government.<sup>126</sup> Congress then undertook to administer this fund to individual claimants by specific acts of appropriation.<sup>127</sup> The claimants in *Weld* sought to recover their full pro rata share of the appropriation enacted by Congress.<sup>128</sup>

The Court acknowledged that absent the Treaty of Washington there would have been no pool of funds to distribute and consequently no act of appropriation.<sup>129</sup> The Court stated, however, that this relationship was too remote for the claim in question to be "dependent upon" the treaty.<sup>130</sup> According to the Court, the relevant inquiry under the treaty exception is whether the right asserted by the claimant derives its "life and existence" from some provision of a

<sup>122</sup> 28 U.S.C. § 1502 (1976).

<sup>123</sup> *Id.* "Treaty" as used in section 1502 has been interpreted to encompass international executive agreements as well as agreements submitted to the Senate for ratification. The rationale behind this interpretation of "treaty" is the principle of separation of powers underlying section 1502 and the avoidance of judicial interference with the conduct of foreign relations. *See Hughes Aircraft Co. v. United States*, 534 F.2d 889, 903 & n.17 (Ct. Cl. 1976).

<sup>124</sup> 127 U.S. 51 (1887).

<sup>125</sup> In the Treaty of Washington of May 8, 1871, Great Britain paid a gross sum of \$15,500,000 to the United States for satisfaction of all claims arising from the actions of two Confederate warships, the *Alabama* and the *Florida*, during the Civil War. *Great Western Ins. Co. v. United States*, 19 Ct. Cl. 206, 207, 217 (1884).

Great Britain had allowed the ships to be built and furnished within its territory. *Great Western Ins. Co. v. United States*, 112 U.S. 193, 194-95 (1884).

<sup>126</sup> *Weld*, 127 U.S. at 56.

<sup>127</sup> *Id.* A Court of Commissioners actually fixed the amount and preference of awards to the individual claimants. *Id.* at 51-54.

<sup>128</sup> *Id.* at 56-57.

<sup>129</sup> *Id.* at 57.

<sup>130</sup> *Id.*

treaty.<sup>131</sup> The Court held that the claim was founded upon the appropriations act, not the treaty, and therefore did not fall within the treaty exception.<sup>132</sup>

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<sup>131</sup> *Id.* Although the statute construed in *Weld* was a predecessor of the Tucker Act, the language was virtually the same. Compare *Weld*, 127 U.S. at 57 (quoting the statutory language, 'dependent upon and grows out of') with 28 U.S.C. § 1502 (1976) ("growing out of or dependent upon").

<sup>132</sup> *Weld*, 127 U.S. at 56-57. The holding in *Weld* states:

In our view of the case, the statute contemplates a *direct* and *proximate* connection between the treaty and the claim, in order to bring such claim within the class excluded from the jurisdiction of the Court of Claims. . . . In order to make the claim one arising out of a treaty within the meaning of [the predecessor of 28 U.S.C. § 1502], the *right itself*, which the petition makes to be the foundation of the claim, must have its origin — derive its life and existence — from some treaty stipulation. This ruling is analogous to that of the ancient and universal rule relating to damages in common-law actions; namely, that a wrongdoer shall be held responsible only for the *proximate*, and not for the *remote*, consequences of his action.

*Id.* at 57.

Five years after *Weld*, the Supreme Court by analogy provided a further clarification of the treaty exception. It said: "As a case arises under the Constitution or laws of the United States whenever its decision depends upon the correct construction of either, [citations omitted], so a case arising from or growing out of a treaty is one involving rights given or protected by a treaty." *United States v. Old Settlers*, 148 U.S. 427, 468-69 (1893). A case in which the treaty exception barred jurisdiction on facts similar to those in *Weld* is *Great Western Ins. Co. v. United States*, 112 U.S. 193 (1884). The litigation in *Great Western* also involved the Treaty of Washington. The right to recover in that case was grounded in the treaty which created a pool of funds to be allocated by act of Congress in satisfaction of American claims. The claimant's theory was that the United States became a trustee for him for the amount of his loss. *Id.* at 195. Congress had never appropriated any of the funds to this claimant. *Id.* at 196-97. The Court held that the claims were dependent on the treaty and without the jurisdiction of the claims court. The Court reasoned that through the treaty the United States government undertook an implied promise to pay the class of American claims against Great Britain, and as a consequence, neither the pool of funds nor the implied obligations to pay existed except by virtue of the treaty's stipulation. *Id.* at 197-98.

Another example of the application of the treaty exception is *Eastern Extension, Austral-Asia & China Telegraph Co. v. United States*, 231 U.S. 326 (1913). The Court, per Justice Hughes, held that claims under a contract with the Spanish government which had been assumed by treaty were excepted from the jurisdiction of the claims court. The Court further elaborated upon the facts and circumstances falling within the treaty exception by stating:

The words 'treaty stipulation' [citing *Weld*] should not be so narrowly interpreted as to permit the exercise of jurisdiction where the claim arises solely out of the treaty cessation. Whether the liability asserted is said to result from an express provision of assumption contained in a treaty, or is sought to be enforced as a necessary consequence of the cessation made by a treaty, it is equally within the policy and spirit of the statute; and the letter of the statute should not be otherwise construed. It is its evi-

The relationship between the treaty exception and the fact that a claim would not have arisen but for the existence of a treaty has also appeared in claims court cases following *Weld*.<sup>133</sup> Perhaps the best example is *Hughes Aircraft Co. v. United States*.<sup>134</sup> An executive agreement<sup>135</sup> between the United States and Great Britain concerning a joint defense satellite communications program formed the basis of the treaty exception question in *Hughes*.<sup>136</sup> Under the original agreement between the two countries, if, perchance, one government suffered liability for patent infringements resulting from those activities actually delegated in the agreement to the other, the other was to provide indemnity.<sup>137</sup> In a supplemental agreement, the United States consented to Great Britain's use of several American patents in the performance of its obligations under the joint program.<sup>138</sup> Under the applicable jurisdictional statute for the claims court,<sup>139</sup> this consent rendered the United States vicariously amenable to suit for Britain's infringement of those patents.<sup>140</sup>

The Hughes Company, the registered owner of the patents, consequently filed suit against the United States in the claims court alleging that the British had infringed upon its patent rights.<sup>141</sup> The government maintained that the court lacked jurisdiction under the treaty exception.<sup>142</sup> In deciding that jurisdiction existed, the *Hughes* court pointed out that the treaty exception had very limited effect.<sup>143</sup> It read *Weld* to require

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dent purpose that the obligations of the United States directly resulting from a treaty should not be determined by the Court of Claims.

*Id.* at 333.

<sup>133</sup> See, e.g., *Hughes Aircraft Co. v. United States*, 534 F.2d 889 (Ct. Cl. 1976); *Societe Anonyme des Ateliers Brillie Freres v. United States*, 160 Ct. Cl. 192 (1963).

<sup>134</sup> 534 F.2d 889 (Ct. Cl. 1976).

<sup>135</sup> International executive agreements are accorded treaty status. See *supra* note 123.

<sup>136</sup> *Hughes*, 534 F.2d at 892.

<sup>137</sup> *Id.* at 894, 905-06.

<sup>138</sup> *Id.* at 900.

<sup>139</sup> 28 U.S.C. § 1498 (1976). See *infra* note 152 for a treatment of the provisions of this statute.

<sup>140</sup> *Hughes*, 534 F.2d at 897-902. See *infra* note 152 and text accompanying notes 150-153 for an explanation of the United States' motives in giving this consent.

<sup>141</sup> *Hughes*, 534 F.2d at 892-97.

<sup>142</sup> *Id.* at 897.

<sup>143</sup> *Id.* at 903.

that the claim exist solely because of the express terms of the treaty.<sup>144</sup> Hence, the court saw the test for the applicability of the treaty exception to be whether the plaintiff's claim could conceivably exist independently of the treaty or, on the contrary, whether its existence was derived exclusively from the terms of the treaty.<sup>145</sup>

The court interpreted the original executive agreement as being merely a reciprocal indemnity agreement and not one creating a private remedy.<sup>146</sup> Moreover, it indicated that when the agreement was viewed from the vantage point of the petition, it became clear that the agreement contained no promises running to the plaintiff.<sup>147</sup> The claims court determined that the fact that both executive agreements provided only a "backdrop"<sup>148</sup> to the claims for patent infringement was not a sufficient nexus to come within the purview of the treaty exception.<sup>149</sup>

The jurisdictional question in *Hughes* provides a good analogy for the jurisdictional issues facing a *Bali* plaintiff in the

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<sup>144</sup> *Id.* at 904.

<sup>145</sup> *Id.* at 903.

<sup>146</sup> *Id.* at 906.

<sup>147</sup> *Id.*

<sup>148</sup> The court in *Hughes* relied heavily on its previous holding in *Societe Anonyme Des Ateliers Brillie Freres v. United States*, 160 Ct. Cl. 192 (1963). In *Societe Anonyme* the plaintiff, a French corporation, had placed funds representing royalties due the United States in an escrow account, pending determination of whether the amount was actually due from the French Government under an American-French executive agreement (the Byrnes-Blum Agreement). After several years without any determination, the plaintiff sued for the return of the funds. *Id.* at 195-96. The claims court held that the treaty exception did not apply:

The Byrnes-Blum Agreement has not been drawn into consideration in this case in the manner anticipated by the Supreme Court in the *Old Settlers* case, [148 U.S. 427 (1893), discussed *supra* note 132]. We agree that there is a connection between the Agreement and the suspense account which has been presented to us for construction. Indeed, this case would never have arisen were it not for the existence of the Byrnes-Blum Agreement, because it is that very Agreement that motivated the parties to establish the "escrow" account around which this dispute is centered. Yet that is a far cry from finding that the claim before us 'derives its life and existence' from some treaty stipulation, as the *Weld* case, [127 U.S. 51 (1887), discussed *supra* notes 124-132 and accompanying text], would require. Instead, the substance of plaintiff's claim is derived from the original patent license contract.

*Id.* at 197.

<sup>149</sup> See *Hughes*, 534 F.2d at 906.

claims court. The statute conferring patent infringement jurisdiction on the claims court requires that such infringement be for the "use" of the United States.<sup>150</sup> The statute further provides that authorization or consent by the government shall be construed as being for the "use" of the government.<sup>151</sup> The jurisdiction of the claims court in *Hughes*, therefore, was *entirely* dependent upon the supplemental consent agreement between the United States and Great Britain.<sup>152</sup> But as the holding in *Hughes* indicates, the claims were in substance for patent infringement and did not "arise out" of the executive agreements.<sup>153</sup>

A *Bali* plaintiff's claim is grounded in the taking clause of the fifth amendment to the Constitution.<sup>154</sup> While no such claim could have arisen but for the liability limitations of the Convention, the treaty exception has been construed to require a more direct causal connection.<sup>155</sup> Simply applying the test from *Weld*<sup>156</sup> reveals that the claim of a taking under the Convention does not "derive its life and existence" from the Convention itself. No stipulation in the treaty grants the right to sue the government when it takes private property for a public use; plaintiffs derive this right from the Constitution. Moreover, the causal connection between the Convention and the taking claim is no less proximate than that of the executive agreements in *Hughes* and the resulting right to sue the United States vicariously in the claims court for patent

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<sup>150</sup> 28 U.S.C. § 1498 (1976).

<sup>151</sup> *Id.*

<sup>152</sup> See *Hughes*, 534 F.2d at 900-01. The consent agreement between the United States and Great Britain was deliberately designed to bring any patent infringement by the British under the jurisdiction of the claims court. *Id.* The claims court has exclusive jurisdiction over any patent infringement by the Government. See 28 U.S.C. § 1498 (1976). By consenting to patent infringement by the British, the United States invoked the exclusive jurisdiction of the claims court and thus prevented the Hughes Company from seeking an injunction against the British in federal district court. Both governments realized that an injunction, if granted, would have caused much delay in the joint defense project. See *Hughes*, 534 F.2d at 900-02. In addition, the reciprocal indemnity clause in the original agreement protected the United States from bearing the ultimate burden of liability. See *supra* text accompanying note 137.

<sup>153</sup> *Hughes*, 534 F.2d at 906.

<sup>154</sup> See *supra* note 7.

<sup>155</sup> See, e.g., *supra* note 148.

<sup>156</sup> See *supra* note 132.

infringement.<sup>157</sup> In short, a *Bali* plaintiff should encounter no great difficulty in establishing the jurisdiction of the claims court.

The path delineated by the Ninth Circuit in *Bali* has thus far proven true. The authorities support the ability of a plaintiff to bring a wrongful death action under state law<sup>158</sup> and to establish the jurisdiction of the claims court.<sup>159</sup> The true bone of contention lies in those issues relating to a taking under the fifth amendment.

#### IV. "TAKING" WITHOUT JUST COMPENSATION UNDER THE FIFTH AMENDMENT

Our founding fathers drafted the taking clause of the fifth amendment in laconic terms, providing no specific guidance as to those instances to which it was intended to apply. The taking clause merely states, "nor shall private property be taken for public use without just compensation."<sup>160</sup> The purpose of the fifth amendment, according to the Supreme Court, is to prevent the Government from forcing individuals to bear public burdens which, as a matter of fairness, should be borne by the public as a whole.<sup>161</sup> The Court has, however, established no precise rule to determine when property has been taken<sup>162</sup> but has instead chosen to weigh the public and private interests presented in the facts of each case.<sup>163</sup> Commentators, unable to identify the principle upon which the disparate taking cases may be reconciled, have ridiculed the inconsistency in the Supreme Court decisions on this is-

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<sup>157</sup> See *supra* notes 134-153 and accompanying text.

<sup>158</sup> See *supra* notes 90-115 and accompanying text.

<sup>159</sup> See *supra* notes 116-157 and accompanying text.

<sup>160</sup> U.S. CONST. amend. V. See *supra* note 7 for the fifth amendment set forth in its entirety. Although the fifth amendment only applies to the federal government, the taking clause was applied to the states through the fourteenth amendment in *Chicago B. & Q.R.R. v. Chicago*, 166 U.S. 226, 239 (1897).

<sup>161</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>162</sup> *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *United States v. Caltex*, 344 U.S. 149, 156 (1952).

<sup>163</sup> *Agins v. City of Tiburon*, 447 U.S. 225, 260-61 (1980).

sue.<sup>164</sup> Nonetheless, the fifth amendment clearly requires that a private property interest must exist and that this property interest must be "taken" before just compensation is due.<sup>165</sup>

### A. *Property Interest*

The great majority of the taking cases presents no issue as to the existence of a property interest because the regulation asserted as violating the fifth amendment is imposed on land.<sup>166</sup> *Bali* plaintiffs must argue, however, that the Convention limits recovery on a wrongful death action under state law, and thus a taking occurs, not of real property, but of a portion of a cause of action.<sup>167</sup> Somewhat similar claims in a variety of contexts have been regarded as compensable property interests.

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<sup>164</sup> E.g., Donaldson, *Regulation of Conduct in Relation to Land — The Need to Purge Natural Law Constraints from the Fourteenth Amendment*, 16 WM. & MARY L. REV. 187, 194 n.48 (1974) ("[I]f the utility of legal rules in a jurisprudential system can be judged by their predictability, the rules employed to determine where the regulation of land use ends and taking of property begins are useless."); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 ("a crazy-quilt pattern of Supreme Court doctrine on the law of expropriation"); Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 244 (1982) ("[T]he present state of of the law is somewhat illogical . . . . [T]he law of police power takings is a widely acknowledged hodgepodge, its doctrines a farrago of fumbblings which have suffered too long from a surfeit of deficient theories."); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37, 46 (1946) ("The predominate characteristic of this area of the law is a welter of confusing and apparently incompatible results . . . . [T]he [Supreme] Court has settled upon no satisfactory rationale for the cases and operates somewhat haphazardly, using any or all of the available, often conflicting theories without developing any clear approach to the constitutional problem."); Stoebe, *Police Power, Takings and Due Process*, 37 WASH. & LEE L. REV. 1057, 1059 n.11 (1980) ("In truth, the collected decisions of the Supreme Court, and all other courts, leave the subject as disheveled as a ragpicker's coat."); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1971) ("With some exceptions, the decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric. Even the modicum of predictability which might otherwise inhere in the pattern of judicial precedents is impaired by the frequently reiterated judicial declaration that each case must be decided on its own facts.").

<sup>165</sup> See J. NOWACK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 480 (2d ed. 1982).

<sup>166</sup> Van Alstyne, *supra* note 164, at 4 n.15.

<sup>167</sup> See *supra* notes 35-36 and accompanying text.

Claims arising in two claims court decisions rendered in the 1800's provide the closest analogy to the claims asserted by a *Bali* plaintiff.<sup>168</sup> In *Meade v. United States*,<sup>169</sup> the alleged property interest was the claims of an American merchant, Meade, against Spain.<sup>170</sup> Meade founded the claims on contracts for supplies that he had sold to the Spanish government.<sup>171</sup> A Royal Commission had verified the authenticity and amount of the claims, and the King of Spain had acknowledged them, making them conclusive against the Spanish government.<sup>172</sup> Spain, however, subsequently ratified a treaty with the United States<sup>173</sup> which released Spain from all claims of American citizens and shifted the liability for those claims to the United States. The treaty also established an American tribunal to evaluate the validity of the claims against Spain and to provide recovery accordingly.<sup>174</sup>

This tribunal refused to receive Meade's Spanish decree of liquidation as evidence of a valid claim and denied Meade

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<sup>168</sup> See *Gray v. United States*, 21 Ct. Cl. 340 (1886); *Meade v. United States*, 2 Ct. Cl. 224 (1866).

<sup>169</sup> 2 Ct. Cl. 224 (1866).

<sup>170</sup> *Id.* at 253.

<sup>171</sup> *Id.* Contracts are granted special immunity from legislative acts of the states under the Constitution. Article I denies to the states the power to pass any law "impairing the obligations of contracts." See U.S. CONST. art. I § 10. By its terms this section does not apply to the acts of the federal government. Neither does it impair even the state's power to "take" a contract. See *Cincinnati v. Louisville & Nashville R.R.*, 223 U.S. 390 (1912) where the Supreme Court distinguished the contract clause and the taking clause in these terms:

The constitutional inhibition upon any state law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefore. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated.

223 U.S. at 400. Contract rights as compensable property interests, therefore, can be analogized to other choses in action for the purpose of a taking question despite the fact that in certain instances contract rights are accorded a unique status under the Constitution.

<sup>172</sup> *Id.* at 257.

<sup>173</sup> *Id.* at 254, 273.

<sup>174</sup> *Id.* at 254.



any compensation.<sup>175</sup> Meade then brought an action in the claims court, alleging that the United States Government's actions constituted a taking compensable under the fifth amendment.<sup>176</sup> To Meade's misfortune, the claims court recognized that jurisdiction over his claim lay exclusively with the tribunal created under the treaty.<sup>177</sup> Nevertheless, the court expressed its opinion that there would have been a taking without just compensation had jurisdiction in the claims court existed.<sup>178</sup> On the issue of the existence of property interest, the court interjected that one's choses in action are "as much property and as sacred in the eye of the law as are his houses and lands, his horses and his cattle."<sup>179</sup>

In accord is *Gray v. United States*,<sup>180</sup> an advisory opinion,<sup>181</sup> arising out of the seizure of American merchant vessels by the French revolutionary government prior to 1801.<sup>182</sup> The validity of the claims of those merchants suffering loss during this period was admitted by the French Government.<sup>183</sup> The United States thereafter surrendered the individual claims in the Treaty of 1800 in return for a cessation of hostilities between the two countries.<sup>184</sup> Addressing whether a property interest existed, the claims court stated:

We do not say that for all purposes these claims were 'property' in the ordinarily accepted and in the legal sense of the word; but they were rights which had a value, a value inchoate, to be sure, and entirely dependent upon adoption and enforcement by the Government; but an actual money value

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<sup>175</sup> The original documents establishing Meade's claims were submitted to the Spanish government as proof of his claims and never returned. *Id.* at 256.

<sup>176</sup> *Id.* at 275.

<sup>177</sup> *Id.* at 276.

<sup>178</sup> *Id.* at 275.

<sup>179</sup> *Id.*

<sup>180</sup> 21 Ct. Cl. 340 (1866).

<sup>181</sup> An advisory opinion is an interpretation of the law without binding effect. BLACK'S LAW DICTIONARY 50 (5th ed. 1979). Congress had given the claims court the authority to rule on the liability of the United States with the proviso that the decision would not be binding upon the United States. *Gray*, 21 Ct. Cl. at 343-46.

<sup>182</sup> 21 Ct. Cl. at 343.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 392.

capable of ascertainment . . . .<sup>185</sup>

While the Supreme Court has never addressed the existence of a property interest in rights of action abrogated by a treaty, it faced the limitation of such rights by domestic legislation in *Armstrong v. United States*.<sup>186</sup> The claimants in *Armstrong* asserted materialmen's liens for the value of materials incorporated into several boats being constructed for the United States Navy.<sup>187</sup> On default of the primary contractor, title to the unfinished hulls was transferred to the government in accordance with the terms of the government construction contract.<sup>188</sup> The government was immune from liability on the materialmen's liens.<sup>189</sup> Consequently, the claimants asserted that the government had effectively destroyed their liens by receiving transfer of title from the contractor.<sup>190</sup> The Court held that compensable property interests existed in the liens.<sup>191</sup> It pointed out that Maine law entitled materialmen to resort to specific property in satisfaction of their claims and that the government's acceptance of title to the hulls precluded the plaintiff's exercise of this right, thus taking the claimants' property in the liens.<sup>192</sup>

Similarly, in *Louisville Joint Stock Land Bank v. Radford*,<sup>193</sup> an amendment to the Bankruptcy Act limited a mortgagee's rights in a mortgage.<sup>194</sup> Under the act, as amended, the mortgagee in effect had to surrender his lien for the fair mar-

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<sup>185</sup> *Id.* at 393. The claims court also elaborated upon the liability of the United States under the fifth amendment, adding:

It seems to us that this 'bargain' . . . by which the present peace and quiet of the United States, as well as their future prosperity and greatness were largely secured, and which was brought about by the sacrifice of the interests of individual citizens, falls within the intent and meaning of the Constitution, which prohibits the taking of private property for public use without just compensation.

*Id.*

<sup>186</sup> 364 U.S. 40 (1960).

<sup>187</sup> *Id.* at 41.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 43.

<sup>190</sup> *Id.* at 41-42.

<sup>191</sup> *Id.* at 44.

<sup>192</sup> *Id.*

<sup>193</sup> 295 U.S. 555 (1934).

<sup>194</sup> *Id.* at 575-76.

ket value of the mortgaged property.<sup>195</sup> Kentucky law, however, protected the rights of a mortgagee to release a lien only upon full payment of the indebtedness.<sup>196</sup> In an opinion by Justice Brandeis, the Court held that a valuable property interest had been taken without just compensation.<sup>197</sup>

While the rights held compensable in the foregoing cases provide an analogy to those claims asserted by a *Bali* plaintiff, the Supreme Court has not specifically considered whether a wrongful death action constitutes a compensable property interest. The Supreme Court, nevertheless, has indicated, as did the claims court in *Meade*<sup>198</sup> and *Gray*,<sup>199</sup> that "property" within the contemplation of the fifth amendment includes intangibles such as choses in action.<sup>200</sup> In addition, the Court has stated that "property" will normally be defined by reference to local law.<sup>201</sup> Whether rights of action in tort are considered as property rights under state law, therefore, becomes material.

<sup>195</sup> *Id.* at 576, 579.

<sup>196</sup> *Id.* at 590.

<sup>197</sup> *Id.* at 601-02. *Dames & Moore v. Regan*, 453 U.S. 654 (1981), also provides authority for the existence of a compensable property interest in liens and attachments. Justice Powell remarked in dissent that "it is settled" that an attachment entitling a creditor to levy on specific property for satisfaction of a claim is property under the fifth amendment. *Id.* at 690 n.1. The majority held that the taking question in that case was not ripe for review. *Id.* at 688-89.

The extent to which *Louisville Bank* may be read as authority on the issue of a "taking" itself or for a statement upon the constitutionality of the provisions found in modern bankruptcy legislation has been vehemently attacked by the Third Circuit in *In re Ashe*, 669 F.2d 105 (3d Cir. 1982). The court stated in *Ashe* that *Louisville Bank* had been decided upon substantive due process principles rather than under the takings clause. *Id.* at 110. *But see* *Rodrock v. Security Indus. Bank*, 642 F.2d 1193, 1197-98 (10th Cir. 1981) (commenting that *Louisville Bank* continues to be cited not only by the Supreme Court in taking cases but by Congress as well in Congressional Reports dealing with bankruptcy legislation).

<sup>198</sup> 2 Ct. Cl. 224, *discussed supra* notes 169-179 and accompanying text.

<sup>199</sup> 21 Ct. Cl. 340, *discussed supra* notes 180-185 and accompanying text.

<sup>200</sup> *See* *Cincinnati v. Louisville & Nashville R.R.*, 223 U.S. 390, 400 (1911).

<sup>201</sup> *See* *United States v. Powelson*, 319 U.S. 166, 279 (1943).

In California, the state in which the *Bali* case was tried, the Civil Code defines rights created by statute as property.<sup>202</sup> The California Court of Appeals has held that the right to compensation for personal injuries inflicted through another's negligence is a property interest recognized and protected under California law.<sup>203</sup> Likewise, the same court has recognized that the right to recover damages in tort is a chose in action and, as such, is property protected from deprivation by the legal process.<sup>204</sup>

Although a right of action in tort may be generally regarded as a property interest under state law, the very fact that the "property" in question is the right to compensation in excess of the Convention's liability limitation raises another specter to haunt the *Bali* plaintiff. Statutes limiting liability to various monetary sums have been prevalent in American jurisdictions for many years.<sup>205</sup> These statutes have taken the form of automobile guest statutes, workmen's compensation and charitable immunity laws, and federal liability

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<sup>202</sup> California defines property as follows:

PROPERTY, WHAT. The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.

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IN WHAT PROPERTY MAY EXIST. There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good-will of a business, trade-marks and signs, and of rights created or granted by statute.

CAL. CIV. CODE §§ 654, 655 (West 1982). In regard to rights of action the Code is even more specific. One section of the Code states: "'Personal property' includes money, goods, chattels, things in action, and evidences of debt." CAL. EVID. CODE § 180 (West 1966). Another portion of the Code adds: "A thing in action is a right to recover money or other personal property by a judicial proceeding." CAL. CIV. CODE § 953 (West 1982).

<sup>203</sup> *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678, 679-80, *hearing denied per curiam*, 93 P.2d 562 (Cal. 1939). The question was presented in the context of an alleged act of malpractice in the delivery of a child. *Id.* at 679.

<sup>204</sup> *Carver v. Ferguson*, 254 P.2d 44, 45-46 (Cal. Ct. App. 1953).

<sup>205</sup> See Haskell, *supra* note 42 at 505-10. The author gives a general overview of various liability limitation schemes in both the federal and state contexts while arguing by analogy for the constitutionality of the Convention under the due process clause. He failed, however, to consider the implications of the Convention's liability limitations under the taking clause of the fifth amendment. *Id.*

limits in admiralty and maritime matters.<sup>206</sup> But the Ninth Circuit in *Bali* saw such limitations on liability as changes in the law that were imposed by the same sovereign entity that created both the right and the remedy.<sup>207</sup> The Ninth Circuit distinguished the liability limitations under the Convention as limitations imposed by an independent body of federal law on rights of action under state law.<sup>208</sup> The Ninth Circuit seemed to assume that Congress was not on an equal plane with the states when altering property rights extant under state law through the otherwise valid exercise of the powers granted it under the Constitution.<sup>209</sup> Upon close examina-

<sup>206</sup> *Id.*

<sup>207</sup> *See Bali*, 684 F.2d at 1312 n.10.

<sup>208</sup> *Id.*

<sup>209</sup> *See Bali*, 684 F.2d at 1312 n.10. The court stated:

[F]urthermore, we are not dealing here with a change in a rule of the common law. Plaintiffs are not complaining of a change in law, but of the limitation of an independently existing right under state law . . . . The source of property rights is necessarily common law or statute, usually state statute.

*Id.* The apparent position of the Ninth Circuit, i.e., that the circumscription of "property" is exclusively within the province of the states, is not without support. Property interests are not created by the Constitution; rather, "they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Supreme Court has also stated in dicta: "[n]or as a general proposition is the United States, as opposed to the several states, possessed of residual authority that enables it to define 'property' in the first instance." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84 (1979). This broad statement in the majority opinion in *Pruneyard*, however, drew concurrences from Justices Blackmun and Marshall, who specifically disagreed with the statement. *Id.* at 88, 93. That the alteration of "property" rights is without the power of the federal government is also at odds with *United States v. Powelson*, 319 U.S. 266, 279 (1943), where the Court stated: "Though the meaning of 'property' as used . . . in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law." The cases following *Powelson* have looked to federal law to determine whether a property interest exists in those instances where applicable state law is confused or nonexistent. *See* Annot., 1 A.L.R. FED. 479, 481, 485-87 (1969). Moreover, following *Pruneyard*, the Court has looked to federal law to determine the content of "property" within the meaning of the fifth amendment where the federal law was more protective. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 162-165 (1980), discussed in Humbach, *supra* note 164, at 248 n.3, 285 n.213. *See also* *Wright v. Union Central Ins. Co.*, 304 U.S. 502, 517 (1938) ("If the argument is that Congress has no power to alter property rights, because the regulation of rights in property is a matter reserved to the states, it is futile").

Given that a purported right under state law is "property" worthy of constitutional protection, the Supreme Court decisions simply do not support the position that a valid act of the federal legislature (an act within the powers enumerated in the Consti-

tion, however, the weight of authority does not support the Ninth Circuit's assumption.

In fact, as illustrated in *Second Employers' Liability Cases*,<sup>210</sup> the acts of Congress are without question supreme over the laws of the states.<sup>211</sup> The *Second Employers' Liability Cases* involved a constitutional challenge to legislation regulating the liability between railroads engaged in interstate commerce and their employees.<sup>212</sup> In this legislation, Congress had abolished several rules under state law, including the fellow-servant rule, contributory negligence, and assumption of risk, which, in effect, had limited a master's liability to his servants.<sup>213</sup> The plaintiff attacked the legislation as being beyond the power of Congress and in contravention of the liberty of contract under the fifth amendment.<sup>214</sup> The Court flatly rejected the challenges.<sup>215</sup> It reiterated the oft-quoted

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tution), which limits or extinguishes rights under state law, is assessed any differently than an act of the state legislature. See *infra* notes 222-232 and accompanying text. The constitutional power of federal courts to alter rights under the state law, however, presents a much different question. The courts, as the final arbiters, are ultimately the organ of the federal government to define the content of "property" within the meaning of the fifth amendment. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution"). Nevertheless, it is the courts, not the legislature, whose power to create and extinguish private rights is circumscribed. See, e.g., *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 79-80 (1938). Where an act of Congress is within the powers delegated in the Constitution, as is the case with the Convention, then any admonition against a federal "definition" of "property" may be more properly directed toward the judiciary than toward the legislature. The remarks of one commentator are especially appropriate on this point:

To be sure, the constitutional meaning of the word property would not have to be defined in terms of substantive law, generally state law, that give force to the legal interests usually comprehended by property. But if the correspondence is not close, the just-compensation clause becomes, in practice, a kind of never-never land anomaly, detached from the texture and policy of the rest of the law.

Humbach, *supra* note 164, at 247-48 (footnotes omitted). The suggestion in *Roth* that "property" must be defined by the "existing rules or understandings . . . such as state law" could be read as another expression of the axiom that courts must look to the traditional rights under statutory or common law in order to ensure that the amendment does not become an "anomaly" amid a plethora of judicial legislation. See generally Humbach, *supra* note 164 at 246-48.

<sup>210</sup> 223 U.S. 1 (1912).

<sup>211</sup> See U.S. CONST. art. VI cl. 2.

<sup>212</sup> 223 U.S. at 6-10, 46.

<sup>213</sup> *Id.* at 49.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 52.

words of Chief Justice Waite, who said:

A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations.<sup>216</sup>

Having found that Congress had the power to abrogate the common law of the state, the Court held that the fifth amendment was not contravened<sup>217</sup> and added emphatically that the congressional act superceded the laws of the states which "[c]over the same field."<sup>218</sup>

Although Congress certainly may override contrary state law by domestic legislation or treaty,<sup>219</sup> to focus solely upon

<sup>216</sup> *Id.* at 50 (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

<sup>217</sup> *Id.* at 52.

<sup>218</sup> *Id.* at 53-54 (quoting *Smith v. Alabama*, 124 U.S. 465, 473 (1887); *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 405-06 (1819)).

Once again, however, there is some support for the distinction drawn by the *Bali* court between the delimitation of state created rights by the state and by the federal government. See *supra* note 209 and accompanying text. The Supreme Court has pointed out that when state law creates a cause of action, the state has an interest in fashioning its own rules of tort law (by invocation of defenses or other limitation) that is "paramount to any discernable federal interest." *Martinez v. California*, 444 U.S. 277, 282 (1980). The Court has further stated that when federal law is the source of a right of action, there is a federal interest in defining the defenses to that claim which is not present in a claim arising under state law. See *Ferri v. Ackerman*, 444 U.S. 193, 198 n.13 (1979).

But the Court has also noted that governmental regulation, by definition, involves the adjustment of private rights. *Andrus v. Allard*, 444 U.S. 51, 65 (1979). When addressing a related issue the Court has said: "When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the state] as if the act had emanated from its own legislature . . . ." *Second Employers' Liability Cases*, 223 U.S. 1, 57 (1912). See also *Block v. Compagnie Nationale Air France*, 229 F. Supp. 801, 809-812 (N.D. Ga. 1964) (stating that state policy against contractual limitations on liability is overridden by federal policy as expressed in the Warsaw Convention), *aff'd*, 386 F.2d 323 (5th Cir. 1967); *Kelly v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*, 242 F. Supp. 129, 145 (E.D.N.Y. 1965) (stating that the "Law of the Land" must be applied notwithstanding contrary state laws). The Ninth Circuit in *Bali* also recognized the ability of federal law to override state law when it reversed the trial court on appeal. See *supra* notes 8-28 and accompanying text.

<sup>219</sup> See *Trans World Airlines v. Franklin Mint Corp.*, 52 U.S.L.W. 4445, 4454 n.6 (April 17, 1984) (Steven J., dissenting) ("Congress naturally could repudiate the Con-

the supremacy of congressional acts is to ignore the proper inquiry under the taking clause.<sup>220</sup> Chief Justice Waite, for example, contrasted “[r]ights of property” with the law “as a rule of conduct.”<sup>221</sup> The ultimate question facing a *Bali* plaintiff, then, is when does a right created under a rule of law become “property” within the meaning of the fifth amendment?

The answer, simply put, is when the right becomes “vested.”<sup>222</sup> Rights under a law giving rise to tort liability vest when the cause of action accrues.<sup>223</sup> The distinction between protected, vested rights and nonprotected, nonvested rights lies in the Court’s perception of the institution of property. The Court has stated that the purpose of recognized property interests, in part, is to protect those claims on which

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vention and set its own liability limitation through domestic legislation, but has not done so”).

<sup>220</sup> See, e.g., *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980) (stating that a (state) legislative body “by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the taking clause of the Fifth Amendment was meant to prevent.”); *Hughes v. Washington*, 389 U.S. 290 (1967) (Stewart, J., concurring) (“[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.”).

<sup>221</sup> See *supra* text accompanying note 216.

<sup>222</sup> See *Ettor v. City of Tacoma*, 228 U.S. 148, 155 (1913); *Keller v. Dravo Corp.*, 441 F.2d 1239, 1242 (5th Cir. 1971).

<sup>223</sup> *Pitts v. Unarco Industries*, 712 F.2d 276, 279 (7th Cir.), *cert. denied*, 104 S. Ct. 509 (1983); *Martinez v. Fox Valley Bus Lines*, 17 F. Supp. 576, 577 (N.D. Ill. 1936).

A court might possibly view the liability limitation of the Convention as affecting a plaintiff’s “remedy” rather than his “right.” The Supreme Court has deftly contrasted “rights” and “remedies” in these words:

Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or deprive one of a vested property right. If the changing or repealing statute leaves the parties a substantial remedy, the legislature does not exceed its authority. Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So also a statute, under the form of taking away or changing a particular remedy, may take away an existing property right, or impair the obligation of a contract.

*Ettor v. City of Tacoma*, 228 U.S. 148, 155 (1913). Whether the Convention would be viewed as affecting the “remedy” rather than the “right” is another question whose answer is uncertain.



people ordinarily rely in their "daily lives."<sup>224</sup> Hence, the Court has concluded that certain interests are not "sufficiently bound up with reasonable expectations . . . to constitute 'property' for Fifth Amendment purposes."<sup>225</sup> For instance, where workmen's compensation laws abolish private rights of action, the Court has held that prospective abolition of such rights is not inconsistent with the Constitution.<sup>226</sup> The legislature may freely alter rights of action because all parties are put on notice of any changes and may structure their activities accordingly.<sup>227</sup>

As the Senate ratified the Convention in 1934,<sup>228</sup> all potential claims for compensation would most certainly have arisen since its adoption. No viable right of action, therefore, could possibly have vested prior to the change in the law. In addition, the reasonableness of "expectations" of full recovery in an international air disaster is made less likely by the Convention's stringent requirements of notice of the liability limitation.<sup>229</sup>

The ability of a *Bali* plaintiff to prove that the Convention's liability limitation is a taking without just compensation may depend in large part upon his ability to persuade the claims court that he indeed possesses a property interest in a right of action at state law. As the foregoing discussion

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<sup>224</sup> Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

<sup>225</sup> Penn Central Transp. Co. v. New York City, 438 U.S. 104, 125 (1978) (citing several examples). See also Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (stating that representations by government officials could lead to expectancies embodied in the concept of "property" through estoppel); Norman v. Baltimore & O.R.R., 294 U.S. 240, 303-05 (1935) (holding that a particular form of money is not private property which may be taken); Sears v. City of Akron, 246 U.S. 242, 249-50 (1918) (holding that the state retains the power to revoke any right granted a corporation in its charter).

<sup>226</sup> Mountain Timber Co. v. Washington, 243 U.S. 219, 235-36 (1917). It is questionable, however, whether a legislature could abolish all rights of action without violating the due process clause of the Constitution. See New York Central R.R. v. White, 243 U.S. 188, 201 (1917); Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 94 & n.3 (1980) (Marshall, J., concurring).

<sup>227</sup> See Sexton v. Newark Dist. Tel. Co., 84 N.J.L. 85, 86 A. 451, 456-57 (1913) (holding that contracts made after the passage of an elective workmen's compensation act but before its effective date are subject to the act in that no property existed in the prior state of the law).

<sup>228</sup> See *supra* note 63 and accompanying text.

<sup>229</sup> See DeVivo, *supra* note 41, at 83-91.

indicates,<sup>230</sup> this task will not be easy. Yet the Ninth Circuit made one additional observation in *Bali* that may aid a plaintiff's quest for full and fair compensation. The court observed that the cases commonly cited for the proposition that a person has no "property" in the common law dealt with statutes creating, not extinguishing, liability.<sup>231</sup> Though the case law does not explicitly support the distinction noted by the court in *Bali* (perhaps because this issue has apparently never been advanced before the Court), it should certainly be pursued by a *Bali* plaintiff. Under a principled analysis of the fifth amendment, however, the efficacy of such a contention is questionable.<sup>232</sup>

### B. *Determination of a Taking*

Assuming that the claims court can be persuaded that a wrongful death action at state law does represent a compensable property interest, the *Bali* plaintiff must next prove that the liability limitation under the Convention "takes" this property interest. The Supreme Court has drawn no bright line to identify the point where regulation becomes a taking.<sup>233</sup> Whenever faced with a taking question, the Court engages in essentially ad hoc factual inquiries,<sup>234</sup> for it admittedly resolves each case as much with the exercise of judgment as with the application of logic.<sup>235</sup> In an effort to clarify those formulae on which taking cases have been decided, however, the Court has identified two tests that are of particular significance to the case presented by a *Bali* plaintiff.<sup>236</sup> These tests are: 1) the economic impact of the regulation on the claimant (the diminution in value theory), and 2) whether the government acted in its enterprise or arbitral capacity (the enterprise-arbitral theory).<sup>237</sup>

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<sup>230</sup> See *supra* notes 205-229 and accompanying text.

<sup>231</sup> *Bali*, 684 F.2d at 1312 n.10.

<sup>232</sup> See *supra* notes 210-229 and accompanying text.

<sup>233</sup> *Andrus v. Allard*, 444 U.S. 31, 65 (1979).

<sup>234</sup> *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>235</sup> *Andrus v. Allard*, 444 U.S. at 65.

<sup>236</sup> *Penn Central*, 438 U.S. at 123-28.

<sup>237</sup> *Id.* The Court in *Penn Central* actually noted two other tests which are not applicable to the claims presented under the *Bali* scenario. See *Penn Central*, 438 U.S. at 125-

1. *Diminution in Value Theory*

The diminution in value theory, perhaps the most popular approach to the taking problem,<sup>238</sup> has its genesis in Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*.<sup>239</sup> In 1921, the Pennsylvania legislature had forbidden coal mining that would cause the subsidence of any structure.<sup>240</sup> Mahon consequently sought to enjoin Pennsylvania Coal from mining near his residence.<sup>241</sup> The Pennsylvania Supreme Court granted an injunction.<sup>242</sup> The company appealed to the United States Supreme Court, contending that the legislation was a taking without just compensation of its right to mine the coal.<sup>243</sup>

In Justice Holmes' view, the taking issue was determinable by the extent of diminution in value of the asserted property interest, a question depending upon the facts in each case.<sup>244</sup> In applying this test, Justice Holmes specifically noted that the coal company's sole interest in the property subject to the legislation was the right to mine coal from the premises.<sup>245</sup> Since Pennsylvania Coal's loss was complete, Justice Holmes was persuaded that a taking had occurred.<sup>246</sup> He concluded that, as a general rule, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized

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27. One test, known as the noxious-use test, states that a regulation on land is not a taking if it controls some noxious use the owner is making of the land. See Stoebuck, *supra* note 164, at 1061. The other test is the so-called physical invasion test. See Stoebuck, *supra* note 164, at 1070-72. The invasion test is best expressed in a recent Supreme Court decision which held that when the character of governmental action is a permanent physical occupation of property, a taking will be found to the extent of the occupation whether the action achieves an important public benefit or has only minimal economic impact on the owner. *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164 (1982).

<sup>238</sup> See Sax, *supra* note 164, at 50; Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 175-76 (1974).

<sup>239</sup> 260 U.S. 393 (1922).

<sup>240</sup> *Id.* at 412-13.

<sup>241</sup> *Id.* at 412.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 413.

<sup>245</sup> *Id.* at 412-13; See Michaelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1230 (1967).

<sup>246</sup> *Pennsylvania Coal*, 260 U.S. at 414.

as a taking."<sup>247</sup>

Exactly what Holmes meant by "too far" has never been answered.<sup>248</sup> Some commentators believe compensation is due when the loss is at two-thirds of value.<sup>249</sup> Some have been unable to determine precisely when a taking occurs.<sup>250</sup> The Supreme Court has denied compensation for losses of 75% and 87% in value.<sup>251</sup> When the Supreme Court has found the fifth amendment violated under this theory, it has done so only when the government's action completely destroyed the asserted property interest.<sup>252</sup>

The outcome is open to conjecture when the diminution in value theory is applied to the Convention's limitation as imposed upon a right of action under state law. Since the Court has failed to adopt any exact percentage of value loss at which a taking occurs,<sup>253</sup> the amount of a jury verdict is not likely to be determinative. Instead, the utilitarian nature of the theory itself will likely dictate the outcome. One commentator has characterized this theory as, in effect, allowing courts to invoke the taking clause to compensate those plaintiffs who show themselves victims of unprincipled exploitation and who present a strong subjective need for compensation.<sup>254</sup>

*Bali* plaintiffs, perhaps more than any other class presenting taking claims, can show that they are victims of forces beyond their control. In addition, their intangible rights to full compensation were effectively destroyed by the liability limitation; their loss is distinguishable from regulation upon real property which may merely prohibit the most beneficial

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<sup>247</sup> *Id.* at 415.

<sup>248</sup> Stoeck, *supra* note 164, at 1064.

<sup>249</sup> See, e.g., F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 208 (1973).

<sup>250</sup> See, e.g., Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149, 156 (1971); Michaelman, *supra* note 245, at 1233.

<sup>251</sup> See *Penn Central*, 438 U.S. at 131 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915)).

<sup>252</sup> See Michaelman, *supra* note 245, at 1233; see also *Penn Central*, 438 U.S. at 127-28 (noting the complete destruction of property interests where taking was recognized under this test).

<sup>253</sup> Stoeck, *supra* note 164, at 1065.

<sup>254</sup> See Michaelman, *supra* note 245, at 1229-30.

use. A sense of justice, which the diminution in value theory provides,<sup>255</sup> favors recovery in a *Bali* plaintiff's case.

## 2. *Enterprise-Arbital Theory*

The Supreme Court has also indicated that a taking question might be resolved by an examination of whether the governmental actions acquired resources for facilitating uniquely public functions.<sup>256</sup> Professor Joseph Sax was the first to suggest resolution of taking questions by analyzing whether governmental actions benefitted the government as an enterprise or only involved the mediation of competing private interests.<sup>257</sup> Professor Sax predicated his theory upon what he perceived to be the historical basis of the taking clause of the fifth amendment.<sup>258</sup> Based on a review of the early commentaries on the taking clause, he stated that its purpose was to constrain the government's otherwise uncontrollable power to appropriate the citizens' private fortunes to its own use.<sup>259</sup> Thus, he perceived the taking clause not only a means of preserving private property but as a shield against arbitrary, unfair, or tyrannical government.<sup>260</sup>

To effect what he believed to be the purpose of the clause, Professor Sax developed a theory grounded on the distinction between government as an enterprise and government as an arbiter.<sup>261</sup> The operation of government as an enterprise, according to Sax, entails economic competition with private enterprise for those resources directly enhancing governmental functions.<sup>262</sup> On the other hand, government in its arbitral capacity acts only to reconcile conflicts between private interests, producing no direct benefit to a governmental function.<sup>263</sup> Sax concluded that compensation is due for losses of private property as a result of governmental enhancement of

<sup>255</sup> See Berger, *supra* note 238, at 177.

<sup>256</sup> See *Penn Central*, 438 U.S. at 128.

<sup>257</sup> Sax, *supra* note 164, at 177.

<sup>258</sup> *Id.* at 58-60.

<sup>259</sup> *Id.* at 60 (quoting 2 STORY, CONSTITUTION 547-48 (4th ed. 1873)).

<sup>260</sup> *Id.* at 64.

<sup>261</sup> *Id.* at 61-67.

<sup>262</sup> *Id.* at 62.

<sup>263</sup> *Id.* at 62-63.

its resource position in its enterprise capacity, whereas losses incurred as consequence of governmental activity in an arbitral capacity are constitutionally noncompensable.<sup>264</sup>

Following Sax's pronouncement of the enterprise-arbitral theory, the Supreme Court has cited examples of several cases where compensation would have been required under this theory, although the theory had not been developed when the cases were decided.<sup>265</sup> In one instance, by the overflight of military aircraft at low altitudes, the government appropriated the value of the land underlying the glide paths to the benefit of a nearby airport.<sup>266</sup> In another, the government gained a servitude over the claimant's land by the repeated firing of coastal defense guns over the land.<sup>267</sup> In a third, the government acquired an easement in lands frequently flooded as an incidence of the improvement of navigation.<sup>268</sup>

The Supreme Court, however, did apply the enterprise-arbitral theory in *YMCA v. United States*,<sup>269</sup> concluding that no taking had occurred.<sup>270</sup> The case arose following riots in Panama in 1964.<sup>271</sup> Several United States Army troops were dispatched to the area of the riots, near the YMCA building.<sup>272</sup> By the time the troops arrived, the rioters had entered and begun looting the YMCA building; the troops expelled the rioters and took up positions outside the building.<sup>273</sup> As the riot intensified, the troops retreated into the building, which then became the target of extensive fire-bombing.<sup>274</sup>

The YMCA brought suit against the United States in the claims court, seeking compensation under the fifth amendment for damages done by the rioters.<sup>275</sup> The claims court

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<sup>264</sup> *Id.* at 63.

<sup>265</sup> See *Penn Central*, 438 U.S. at 128.

<sup>266</sup> See *United States v. Causby*, 328 U.S. 256 (1946).

<sup>267</sup> See *Portsmouth Co. v. United States*, 260 U.S. 327 (1922).

<sup>268</sup> See *United States v. Cress*, 243 U.S. 316 (1917).

<sup>269</sup> 395 U.S. 85 (1969).

<sup>270</sup> *Id.* at 92.

<sup>271</sup> *Id.* at 87.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 87-88.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 86.

held that the actions of the Army did not constitute a taking under the fifth amendment.<sup>276</sup> On appeal to the Supreme Court, the YMCA argued that the troops had entered the building as part of the general defense of the canal zone.<sup>277</sup> The Court ruled to the contrary, indicating that the purpose of dispatching the soldiers was to protect private property.<sup>278</sup> The Court reasoned that where a private party "is the particular intended beneficiary" of governmental action, "fairness and justice" do not require that the resulting losses be borne by the public.<sup>279</sup>

To borrow from the language of the Court in *YMCA*, the historical evidence suggests that the intended beneficiaries of the Convention at the time of its ratification by the United States were private parties. The passengers benefited from the resulting uniformity in the law governing an air disaster.<sup>280</sup> The liability limitation allowed the fledgling airlines to become firmly established in the field of international transportation.<sup>281</sup> The limitation may have also advanced uniformity in the law by encouraging acceptance of the Convention among the numerous less developed nations of the world.<sup>282</sup>

Whether the Convention any longer serves interests other than the United States Government's interest in maintaining international cooperation is open to question.<sup>283</sup> If indeed the official statement of the American delegation to the Montreal Conference can be accepted as true,<sup>284</sup> a cogent argument can be made that the government's acceptance of the Montreal Agreement was in the nature of enhancement of national prestige and power in its enterprise capacity. On the other hand, the international aviation industry still has limited lia-

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<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 90.

<sup>278</sup> *Id.* at 90-91.

<sup>279</sup> *Id.* at 92.

<sup>280</sup> See *supra* text accompanying notes 58-62.

<sup>281</sup> See *supra* text accompanying notes 53-57.

<sup>282</sup> See *supra* note 52.

<sup>283</sup> See *supra* notes 77-81 and accompanying text.

<sup>284</sup> *Id.*

bility, and uniformity in the laws still exists,<sup>285</sup> suggesting governmental action in its arbitral capacity.

How a court would resolve the taking question under the enterprise-arbitral theory is unclear. Professor Sax, however, provided some insight as to how difficult taking questions might be analyzed under his theory. He would first ask whether the case was one of individual cost-bearing of some public endeavor.<sup>286</sup> Since the burden under the Convention falls solely upon those injured in international air travel as opposed to all other transportation, the answer to this question is arguably yes. To resolve the taking question, Sax would then ask whether the loss was a private loss inuring to the benefit of a government enterprise.<sup>287</sup> Whether the answer to the second question is affirmative will depend upon a plaintiff's ability to marshal sufficient evidence to show that the government indeed used his right to recovery as a "bargaining chip"<sup>288</sup> in international relations through the acceptance of the Montreal Agreement.

## V. CONCLUSION

Whether the Warsaw Convention's liability limitation can ultimately be proven a taking without just compensation under the fifth amendment is impossible to predict. The outcome depends upon a series of uncertain issues, of which some are more indeterminate than others. It is conceivable, however, to successfully prove that the liability limitation is a taking under the scenario suggested by the Ninth Circuit in *Bali*. The premise underlying the *Bali* scenario, that a plaintiff

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<sup>285</sup> See *supra* text accompanying notes 82-89.

<sup>286</sup> Sax, *supra* note 164, at 76.

<sup>287</sup> *Id.* Sax actually speaks in terms of economic benefit accruing to the government from the appropriation of tangible property. *Id.* at 63-76. His logic applies with equal force, however, to the appropriation of an intangible property right where the benefit accruing to the government is in the form of international comity, for the risks Sax identified as underlying his theory are also present in this instance. See Sax, *supra* note 164, at 64-67.

<sup>288</sup> See *Dames & Moore v. Regan*, 453 U.S. 654 (1980) (Powell, J., concurring in part and dissenting in part) ("The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts").



may initially bring a wrongful death action under state law, appears to rest upon a solid foundation: the existence of a nonexclusive right of action under the Convention is amply supported by authority.<sup>289</sup> The ability of a *Bali* plaintiff to invoke the jurisdiction of the claims court also appears fairly certain.<sup>290</sup>

Establishing the elements of a taking claim itself, on the other hand, is not assured. Neither, however, is it impossible. Rather, the apparent inconsistencies in the decisions under the fifth amendment precludes any degree of certainty in the outcome of a taking challenge until judgment has actually been rendered.<sup>291</sup>

While this area of the law is certainly in a quandary, a few observations may nonetheless be made. Persuading the claims court that a compensable property interest exists in a right of action at state law will indeed be difficult. Though analogous cases in support of a *Bali* plaintiff's position are certainly to be found,<sup>292</sup> those decisions focusing on the distinction between vested and nonvested rights in the determination of "property" cast grave doubt on the likelihood of achieving just compensation under the fifth amendment.<sup>293</sup> Yet, if the existence of "property" can be proven so that the various tests which determine when property is "taken" are applied to the Convention's limitation on rights of action under state law, the result is more unclear than discouraging.<sup>294</sup>

Furthermore, if, as the commentators have unanimously declared, the courts have not engaged in any principled basis of decision making in the cases arising under the taking clause,<sup>295</sup> the context in which the claim arises and the constitutional implications of a decision favorable to the plaintiff are noteworthy. The fact that the Convention is a treaty

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<sup>289</sup> See *supra* notes 90-115 and accompanying text.

<sup>290</sup> See *supra* notes 116-159 and accompanying text.

<sup>291</sup> See *supra* note 164.

<sup>292</sup> See *supra* notes 166-204 and accompanying text.

<sup>293</sup> See *supra* notes 205-232 and accompanying text.

<sup>294</sup> See *supra* notes 233-288 and accompanying text.

<sup>295</sup> See *supra* note 164.

could perhaps have some bearing on the claims court's inclination to declare it a taking. For example, the Supreme Court has never invalidated a treaty intimately related to foreign affairs on the ground that it was beyond the power of the federal government.<sup>296</sup> Under the taking clause in particular, the Supreme Court has refused to scrutinize any settlement by the United States and a foreign government when the resulting treaty vested Congress with the discretion to compensate the private claimants.<sup>297</sup> Additionally, the fact that awarding a *Bali* plaintiff the compensation he seeks under the fifth amendment would necessarily entail a constitutional proscription on the powers of Congress vis-a-vis the states might be influential. On several occasions, the Court has cautioned judges against hastily reading limitations on legislative power into the Constitution.<sup>298</sup> Finally, the Court has also hinted that the financial ability of the United States to compensate a class of claimants may have some influence upon the outcome of a taking claim.<sup>299</sup>

Considerations not at odds with sound policy and institutional integrity exist, however, to rebut the foregoing sources of influence upon the court faced with a *Bali* plaintiff's contentions. The taking clause was designed to prevent the government from "forcing some people to bear public burdens

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<sup>296</sup> HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 208 (1972).

<sup>297</sup> *Id.* at 263.

<sup>298</sup> See *Nobel State Bank v. Haskell*, 219 U.S. 104, 110 (1911) (Holmes, J.) (cautioning judges against reading a "*nolumus mutare* as against the law-making power" into the Constitution while rejecting a challenge under the taking clause to a change in state law). See also *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) (stating that to accept a claim under the taking clause that the common law of trespass is not subject to revision by the states would represent a return to the *Lochner* era); *New York Cent. R.R. v. White*, 243 U.S. 188, 202 (1917) (stating that the rules of the common law affecting social relations are not placed beyond the law-making power of the states by the fourteenth amendment); *Holden v. Hardy*, 169 U.S. 366, 386 (1898) (stating in response to a due process challenge under the fourteenth amendment to the regulation of working hours of miners that "while the cardinal principles of justice are immutable," the methods of administering justice are subject to change and that the Constitution, which is exceedingly difficult to amend, should not be construed as depriving the states of the power to amend their laws).

<sup>299</sup> See *Penn Central*, 438 U.S. at 124 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 423 (1922)). See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 460 n.2 (1978) (suggesting that the ability to limit recovery costs might result in the extension of compensation).

which in all *fairness* and *justice* should be borne by the public as a whole."<sup>300</sup> To fulfill this purpose, the Court has essentially engaged in value judgments as to the propriety of awarding compensation when deciding a case arising under the taking clause.<sup>301</sup> Obviously the liability limitation imposed under the Convention no longer comports with the American concept of fairness.<sup>302</sup> In addition, the international political stagnation marking the history of the Convention has for fifty years prevented the normal legislative process from accommodating the evolving values of society, which have come to favor full compensation for losses suffered. An argument can be made then, that the courts should take a very activist role whenever confronted with a controversy involving the Convention.<sup>303</sup> Deference to the political branches of the federal government, because the Convention is a treaty or because a favorable resolution would to some extent delimit legislative authority, is not compelled nor is it consistent with fairness and justice toward the victim of an international air disaster.

In assessing whether, or how, to proceed with a constitutional challenge to the Convention under the taking clause, a *Bali* plaintiff should not casually dismiss the significance of the notions of fairness embodied in the taking clause. The confusion prevalent in this area of the law itself attests to the fact that ultimately fairness is a strong force in the resolution of taking cases. Whether fairness would be the dominant consideration in a court's decision remains to be seen. The *Bali* plaintiff, however, who is twice the victim, first of an air disaster, and second of the unreasonably low liability limitation imposed under the Convention, may very well be the one plaintiff who can prevail under the taking clause despite considerable adversity.

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<sup>300</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See also *supra* notes 161-163, 255, 286-287 and accompanying text.

<sup>301</sup> See *supra* text accompanying notes 233-235.

<sup>302</sup> See *supra* notes 68-81 and accompanying text.

<sup>303</sup> See L. TRIBE, *supra* note 299, at 929-30. Professor Tribe first recognized "political logjams" as a rationale for judicial activism in the context of the right to abortion. *Id.*